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No. 07-1114

IN THE

Supreme Court of the United States

GARY BRADFORD CONE,

Petitioner,

vs.

RICKY BELL, Warden,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

As stated by petitioner in the Petition for Writ of Certiorari:

"The question presented is whether petitioner is entitled to federal habeas review of his claim that the State suppressed material evidence in violation of *Brady* v. *Maryland*, which encompasses two subquestions:

"1. Is a federal habeas claim 'procedurally defaulted' because it has been presented twice to the state courts?

"2. Is a federal habeas court powerless to recognize that a state court erred in holding that state law precludes reviewing a claim?"

Fairly included in the petitioner's questions are these questions:

3. Was the *Brady* claim in this case fairly presented to the state courts at all?

4. Did the "last reasoned opinion" of the state courts in this case err?

5. Can a federal habeas court declare a state-court procedural default ruling "inadequate," as an "exorbitant application" of a generally valid state rule, on the basis of an argument that the petitioner never presented to the state court that made the dispositive ruling?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to represent the interests of victims of crime and the law-abiding public in the criminal justice system. In this case, petitioner asks this Court to expand the "inadequate state grounds" doctrine far beyond its present extent to reopen a weak claim correctly rejected by the state appellate court over a decade ago, further delaying justice in a case where it is already grossly overdue. This request is contrary to the interests CJLF was formed to protect.

1. The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

SUMMARY OF FACTS AND CASE

Twenty-eight years ago, on August 10, 1980, Shipley Todd, 93, and his wife Cleopatra Todd, 79, were in their home in Memphis, Tennessee. Gary Cone broke the latch on their back door and entered their home. See *State* v. *Cone*, 665 S. W. 2d 87, 90 (Tenn. 1984) (direct appeal). Cone was on the run from a jewelry store robbery he committed the day before. In the course of his escape, he shot a police officer pursuing him, shot one private citizen, and would have shot a third but for running out of ammunition. See *ibid*. As Cone later stated to his own expert, " 'he was at [the Todds'] house with the *agenda* of getting cleaned up, getting fed, so that he could flee the area. And in the course of his time there they ceased to cooperate with him, and he started to try to control them . . . ." *Id*., at 91 (emphasis added). He controlled them by beating them to death, and his identity as the perpetrator has never been in doubt. See *id*., at 90; Brief for Respondent 5-6.

Cone engaged in premeditated, goal-directed activities before, during, and after the crimes against Mr. and Mrs. Todd. See Brief for Respondent 48-49. Even so, with no doubt of identity in the case, he resorted to a mental defense. The experts for each side gave conflicting opinions. See 665 S. W. 2d, at 92. Not surprisingly, given the defendant's ability to understand what he was doing as demonstrated by the undisputed facts of the crimes and escape, the jury rejected his mental defense. See *ibid*. Also unsurprisingly, the jury chose a sentence of death for "the brutal murders of two elderly defenseless persons by an escaping armed robber who had terrorized a residential neighborhood for twenty-four hours." *Id*., at 95-96.

On direct appeal, Cone made numerous claims, including one that "the State failed to properly produce witness statements . . . ." *Id*., at 94. The Tennessee

Supreme Court rejected all the claims and affirmed. See *id*., at 96.

Cone filed a state postconviction review petition, which was denied, and he appealed to the Court of Criminal Appeals. See *Cone* v. *State*, 747 S. W. 2d 353, 354 (Tenn. Crim. App. 1987). His claim of improper prosecutor argument was rejected on the merits. See *id*., at 355. He also claimed ineffective assistance of counsel, citing five alleged shortcomings of his trial attorney. One of these was rejected as being raised for the first time on appeal, see *id*., at 357, and the others were rejected on the merits. See *id*., at 357-358.

Cone filed a successive postconviction petition *pro se*, which the trial court dismissed. The Court of Criminal Appeals reversed, requiring the trial court to give Cone an opportunity to rebut the presumption that claims not raised previously were waived. *Cone* v. *State*, No. 48, 1991 Tenn. Crim. App. LEXIS 364 (May 15, 1991).

On remand, the court appointed counsel. Counsel filed an amended petition, an amendment to that petition, and an affidavit intended to rebut the presumption of waiver. These documents are further described in Parts I and II, *infra*. Paragraphs 35 and 41 stated claims for nondisclosure of exculpatory evidence but failed to state any coherent legal theory, instead making a blanket allegation of violation of every conceivably relevant constitutional provision and a few inconceivable ones. See *infra*, at 8. The trial court denied all of the multitude of claims as either previously determined or defaulted.

Cone appealed again to the Court of Criminal Appeals, as described in Part III, *infra*. Nowhere in his brief did he mention *Brady* v. *Maryland*, 373 U. S. 83 (1963), or any case in that line, nor did he mention that

the factual basis for his nondisclosure claim was unavailable to him until the second postconviction proceeding. See Brief of Petitioner-Appellant, Court of Criminal Appeals (Aug. 1994), R. 4, Add. 4, Doc. 2.[2] The appellate court affirmed. *Cone* v. *State*, 927 S. W. 2d 579 (Tenn. Crim. App. 1995).

Cone requested discretionary review of this decision by the Tennessee Supreme Court. For the first time in all of his state pleadings, petitioner finally identified paragraph 41 of his petition as a *Brady* claim. See Application for Permission to Appeal 6, R. 4, Add. 4, Doc. 8. He also made to the Supreme Court the argument he did not make to the Court of Criminal Appeals, *i.e.*, that he raised the *Brady* claim at the first opportunity after obtaining access to the facts. See *id*., at 12-13. He argued that the Court of Criminal Appeals' decision was in conflict with another decision then under review, dealing with the issue of waiver in circumstances similar to Cone's case. See *id*., at 13-14. The Tennessee Supreme Court denied the application, and it denied a petition for rehearing. See App. to Pet. for Cert. 93a-94a. This Court denied certiorari. *Cone* v. *Tennessee*, 519 U. S. 934 (1996).

Almost 17 years after the crime, the case finally proceeded to federal habeas. Sorting out the properly presented claims from the defaulted ones despite the confused presentation, see App. to Pet. for Cert. 98a, the District Court found only 4 out of 51 claims had been properly exhausted and not defaulted. See *id*., at 99a. With regard to the *Brady* claims, the District Court held that the claims were defaulted and Cone had not established cause. See *id*., at 114a-115a. The

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2. Citations to the record follow the form in the Brief for Respondent 2, n. 1. Scanned copies of the documents are also on CJLF's website at http://www.cjlf.org/briefs/Cone/Cone.htm.

District Court alternatively rejected the claims on the merits. With regard to the nondisclosed evidence of drug use, the District Court held, "the evidence does not devastate the state's case or even credibly impeach the state's witnesses. Cone's claims in this regard are exaggerated and devoid of merit." *Id.*, at 119a, n. 9. The District Court further held that Cone could not meet his burden of proof that the documents were not, in fact, disclosed. See *ibid*.

On appeal, the Court of Appeals for the Sixth Circuit affirmed on the *Brady* claim. The Court of Appeals panel held, without dissent, "we believe that Cone's claims are procedurally defaulted and that he cannot show cause and prejudice to overcome the default." *Cone* v. *Bell*, 243 F. 3d 961, 968 (CA6 2001). The Court of Appeals then held in the alternative, again without dissent, "even if that were not so, we are satisfied that the documents Cone complains were withheld are not *Brady* material." *Ibid*. The Court of Appeals granted relief on ineffective assistance, however, see *id*., at 979, and this Court reversed. *Bell* v. *Cone*, 535 U. S. 685 (2002).

On remand, the Court of Appeals again granted relief, this time finding an aggravating circumstance impermissibly vague. See *Cone* v. *Bell*, 359 F. 3d 785, 797-799 (CA6 2004). Under the standard of 28 U. S. C. § 2254(d), this conclusion was so clearly erroneous as to warrant unanimous summary reversal. See *Bell* v. *Cone*, 543 U. S. 447 (2005) (*per curiam*). On remand for the second time, a majority of the panel reiterated its conclusion that the *Brady* claim was both defaulted and meritless. See *Cone* v. *Bell*, 492 F. 3d 743, 756 (CA6 2007).

This Court granted certiorari on June 23, 2008.

SUMMARY OF ARGUMENT

Before a claim may be made on federal habeas corpus, it must be "fairly presented" to the state courts. Petitioner's presentation to the trial court was not a fair presentation of a claim under *Brady* v. *Maryland* as defined by this Court's precedents. An allegation of fact combined with a blanket invocation of broad constitutional rights is insufficient to invoke "the more particular analysis" of a doctrine such as *Brady*.

The controlling state court opinion in this case, that of the Court of Criminal Appeals, held that the nondisclosure claim was procedurally defaulted, not previously determined. That court correctly addressed the arguments presented to it. Petitioner now claims this is an "exorbitant application" of the state rule because he did, in fact, have good cause for not presenting his claim earlier. However, this argument was not presented to the state appellate court. By analogy to *Edwards* v. *Carpenter*, petitioner cannot defeat the application of a valid state rule with a claim that he qualified for an exception when he did not present that argument to the proper state court.

The Court of Appeals' rejection of the *Brady* claim on the merits is holding, not dictum. Petitioner did not seek review of this holding, it is not the kind of issue this Court normally reviews, and it is correct.

ARGUMENT

In parts II and III, *infra*, *amicus* will address how the federal courts should deal with the confusing record of state court proceedings in this case. First, though we believe it is necessary to place in context the reason for the confused state of the record.

I. The difficulty in this case is due in substantial part to the scattershot pleading of state collateral review counsel.

"It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search." *Brown* v. *Allen*, 344 U. S. 443, 537 (1953) (Jackson, J., concurring in the result). Justice Jackson's wisdom about a flood of applications applies equally to a flood of claims within a single application, and this principle is important to understanding the nature of the state-court proceedings in this case.

Pages 17-22 of the Joint Appendix present this Court with the needle and several straws, minus the bulk of the haystack. This is closer to the picture postconviction counsel *should* have presented to the trial court, if the *Brady* claim were really as weighty as present counsel contends. It is not the picture they *did* present, and therein lies the problem.

Petitioner's August 3, 1993 postconviction petition contained 90 claims and subclaims. See Brief for Respondent 14. Paragraph 35, excerpted in the Joint Appendix at pages 13-14, is a claim for nondisclosure of exculpatory evidence. However, it is not stated as a claim under *Brady* v. *Maryland*, 373 U. S. 83 (1963), or even under the Due Process Clause. Instead, counsel alleged, "The State violated petitioner's rights under [the] Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution" and parallel provisions of the Tennessee Constitution. Such blanket allegations are insufficient to fairly present a claim to the state court for the purpose of the exhaustion rule. See Part II, *infra*. Paragraphs 21-36 in this petition all alleged a violation of the same constitutional provisions. R. 4, Add. 4, Doc. 1, pp. 77-81.

Two months later, counsel for petitioner presented an amendment adding 12 additional claims. The first of these, paragraph 41, is the nondisclosure claim that is the primary subject of the case in this Court, *i.e.*, nondisclosure of evidence of petitioner's drug use. See J. A. 20. Again, there is no citation to *Brady* or even specifically to the Due Process Clause. Instead, counsel claimed a violation of the nine constitutional provisions claimed in most of the claims in the original petition, plus five new ones. Nondisclosure of exculpatory evidence now violates constitutional protections regarding double jeopardy, see Tenn. Const. Art. I, § 10, ex post facto laws, see *id*., § 11, indictment, see *id*., § 14, and open courts, see *id*., § 17, the state trial court was told. Following paragraph 41 are 11 more claims, all alleging violation of the same 13 constitutional provisions. R. 4, Add. 4, Doc. 1, pp. 139-144.

In an ideal world of unlimited resources, judges would pick through every straw in the haystack, finally discovering the one or two needles. The world is not ideal, though, and it never will be. Courts depend on lawyers to sift, refine, and focus the issues. Just as they do not have the resources to seek out issues that counsel has failed to brief, see *Baldwin* v. *Reese*, 541 U. S. 27, 31-32 (2004), they do not have the resources to find the needle that counsel buries in a haystack. Faced with the complete failure of postconviction counsel to perform the focusing function, the trial court painted with a broad brush. In that process, claim 41 was mistakenly assigned to the wrong category, designated "previously determined" with a group of others, rather than "waived," *i.e.*, procedurally defaulted, as it should have been.

In this Court, petitioner asserts that there is little question that this claim is meritorious. See Brief for Petitioner 52; but see Brief for Respondent 41-50. The

lack of attention to this supposedly compelling claim by the state trial court is directly attributable to the haystack briefing of postconviction counsel. Such briefing is not only a disservice to the judicial system, it is bad advocacy. As this Court noted a quarter century ago, "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Jones* v. *Barnes*, 463 U. S. 745, 751-752 (1983). Later writers are in accord. See B. Clary, S. Paulsen, & M. Vanselow, Advocacy on Appeal 35, 61 (2d ed. 2004); A. Scalia & B. Garner, Making Your Case: The Art of Persuading Judges 23 (2008).

Regrettably, the capital defense bar has developed a culture that is diametrically opposed to the wisdom of *Jones*. Lawyers are exhorted to bury courts in paper, to file motions "just to make trouble," Lyon, Defending the Death Penalty Case: What Makes Death Different, 42 Mercer L. Rev. 695, 700 (1991), and to make arguments so frivolous they would be sanctionable in a civil case. See Freedman, The Professional Obligation to Raise Frivolous Issues in Death Penalty Cases, 31 Hofstra L. Rev. 1167 (2003). These exhortations are flatly contrary to long-established norms of ethical advocacy. "Ethical considerations . . . prevent counsel from making dilatory motions . . . or advancing frivolous or improper arguments . . . ." *McCoy* v. *Court of Appeals of Wis., Dist. 1*, 486 U. S. 429, 435 (1988).

Amicus CJLF respectfully asks this Court to unequivocally reassert the principles of *Jones* and *McCoy* as fully applicable to capital cases. Appellate and postconviction counsel do *not* have an obligation to make every conceivable argument, as Freedman suggests they do, see 31 Hofstra L. Rev., at 1179, but rather they have an obligation not to. As explained by

this Court in *Jones* and by analogy to Justice Jackson's insights in *Brown*, burying the arguably meritorious claim in a flood of worthless ones reduces rather than enhances the possibility of obtaining relief in the state court.

At one time, when the procedural default rule was the primary limitation on federal habeas corpus, making every conceivable argument in state court was arguably defensible. Some believed that the goal was not to actually win there so much as to preserve arguments for the "real" battle in federal court. But see *Barefoot* v. *Estelle*, 463 U. S. 880, 887 (1983) ("secondary and limited"). The theory was that even an argument clearly precluded by this Court's precedents needed to be preserved in the hope that the "annually improvised . . . 'death is different' jurisprudence," see *Morgan* v. *Illinois*, 504 U. S. 719, 751 (1992) (Scalia, J., dissenting), might sprout a new branch between state and federal review. That was a realistic expectation during a time of chaotic jurisprudence. For example, few could have expected, when this Court was focused on curbing arbitrariness in capital sentencing and requiring that discretion be "directed and limited," see *Gregg* v. *Georgia*, 428 U. S. 153, 189 (1976), that it would someday hold that a state *must* allow each individual juror to decide what is mitigating. But it did just that in *Mills* v. *Maryland*, 486 U. S. 367 (1988).

Today the habeas landscape is dramatically different. The procedural default rule is one of the lesser restrictions on federal habeas corpus for state prisoners, with relatively broad exceptions. Instead of the prior rule of *de novo* review, a weak claim rejected on the merits by the state court post-AEDPA cannot produce a grant of relief in federal court under 28 U. S. C. § 2254(d), because a decision rejecting a weak claim is necessarily reasonable. "Preserving" a claim that is

certain to be barred by § 2254(d) is pointless. The only claims resolved on the merits in state court that can later be grounds for federal habeas relief are those so strong on existing law that the state court's rejection would be unreasonable. Few, if any, cases have more such claims than can be counted on one hand.

Effective and ethical advocacy in capital cases is the same as in other cases in this regard. Counsel should focus on the strong claims and let the weak ones go. In this respect, death is not different. Counsel need not make every argument and must not make frivolous ones. States paying for counsel should pay for the focused advocacy described in *Jones*, not the kind of haystack dump that occurred in this case. It would help prevent problems such as the one in this case if this Court would expressly say so.

II. The *Brady* claim was not fairly presented to the state trial court.

A. Questions Fairly Included in the Questions Presented.

While petitioner protests that the Court of Appeals failed to examine what happened in the state courts in this case, see Brief for Petitioner 29, he simultaneously attempts to preclude two arguments regarding what really did happen there: "(i) that petitioner defaulted his *Brady* claim by not raising it prior to his second amended state post-conviction application, or (ii) that paragraph 41 of that application was insufficiently detailed to preserve the claim for federal habeas review." Brief for Petitioner 22, n. 4. However, the questions properly before this Court include not only the petitioner's questions as he chooses to word them but also any "subsidiary question fairly included in the question presented." *Caspari* v. *Bohlen*, 510 U. S. 383,

389 (1994). Such questions include any "necessary predicate" to the question presented. *Id*., at 390.

In *Ohio* v. *Robinette*, 519 U. S. 33, 35 (1996), the question presented was whether an advisement was required before asking a lawfully stopped motorist for consent to search. The question of whether the motorist really was lawfully stopped at that point was "a 'predicate to an intelligent resolution' of the question presented and therefore 'fairly included therein.' " *Id*., at 38. Like the question in *Robinette*, each of petitioner's two questions in this case has a questionable premise, and the correctness of the premise is fairly included in the question.[3]

As for petitioner's argument that these precise points were not raised below, no such precision is required. The state's position throughout the federal litigation has been that the claim is defaulted. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *Escondido*, 503 U. S. 519, 534 (1992). Even when an issue has never been raised by a party at all, this Court has the discretion to, and sometimes does, address an issue raised for the first time in this Court by an *amicus curiae*. See, *e.g.*, *Mapp* v. *Ohio*, 367 U. S. 643, 646, n. 3 (1961); *Teague* v. *Lane*, 489 U. S. 288, 300 (1989) (plurality opinion).

Petitioner's first question is whether "a federal habeas claim [is] 'procedurally defaulted' because it has been presented twice to the state courts?" A necessary

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3. This analysis assumes that the questions presented are limited to petitioner's two "subquestions." See Brief for Petitioner i. Arguably, the issues properly before the Court include every question fairly included in "whether petitioner is entitled to federal habeas review of his [*Brady*] claim . . . ." See *ibid*.

predicate to that question is that the claim *has* been presented to the state courts. We will address that question in this Part. In his second question presented, petitioner asks, "Is a federal habeas court powerless to recognize that a state court erred in holding that state law precludes reviewing a claim?" We address a necessary predicate to that question in Part III, *infra*.

B. Fair Presentation.

Petitioner protests that in earlier stages of this litigation, the State shifted positions between saying that the *Brady* claim was rejected by the state courts as previously determined, rejected by them as procedurally defaulted, and never presented to the state courts at all. See Brief for Petitioner 21. This confusion is, in reality, completely understandable in light of the failure of postconviction counsel to simply and clearly identify the *Brady* claim and the unfortunate but understandable error of the trial court in ruling on the scattershot petition. See Part I, *supra*. In retrospect, the "previously determined" holding was erroneous, but whether the claim was ever "fairly presented" to the state courts as required for subsequent consideration on federal habeas is doubtful.

A petitioner must fairly present his federal claim to the state courts first, before collateral review of the claim on federal habeas corpus is permitted. See *Baldwin* v. *Reese*, 541 U. S. 27, 29 (2004). Similar principles apply on direct review of state judgments in this Court. In *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 67 (1928), a state habeas case, the Court held that the federal claim must be stated with "fair precision and in due time." See also *Adams* v. *Robertson*, 520 U. S. 83, 87 (1997) (*per curiam*) (civil case, quoting *Bryant*).

In *Teague* v. *Lane*, 489 U. S. 288 (1989), the petitioner challenged the selection of his jury under multiple theories. The Sixth Amendment theory presented to the state courts was not sufficient to meet the requirement of fair presentation so as to preserve an equal protection theory based on *Swain* v. *Alabama*, 380 U. S. 202 (1965). See *Teague*, *supra*, at 298. Similarly, in *Yee*, 503 U. S., at 533, presentation of a takings claim did not preserve a substantive due process claim. In *Gray* v. *Netherland*, 518 U. S. 152, 162-166 (1996), the Court distinguished between two different due process claims and remanded one of them for a determination of whether it had been presented to the state courts. Thus, simply alerting the state court to the federal nature of the claim is not sufficient to preserve all federal theories. The statement in *Baldwin* v. *Reese*, 541 U. S. 27, 32 (2004), that petitioner need only designate the claim "federal" was made in the context where the petitioner had plainly stated an ineffective assistance claim and the only question was whether the claim was made under state or federal law.

So the question is, can a litigant preserve every conceivable federal constitutional theory simply by alleging a violation of every conceivably relevant provision of the Constitution, without citing a single federal case, a single state case relying on federal law, or even which clause of the multiclause amendments he is relying on? See J. A. 20. *Anderson* v. *Harless*, 459 U. S. 4 (1982) (*per curiam)*, suggests the answer is no. The habeas petitioner in that case presented the federal court with a claim that the jury instruction violated the rule of *Sandstrom* v. *Montana*, 442 U. S. 510 (1979), against burden-shifting presumptions. He had presented the facts underlying the claim to the state court. *Anderson*, *supra*, at 6. He had invoked the broad federal due process right through citation of a state case involving that right. See *id*., at 7. That was not suffi-

cient to present a claim based on "the more particular analysis developed in cases such as *Sandstrom*, *supra*." *Ibid.*; see also *Gray*, 518 U. S., at 162-165 (applying *Anderson*).

The policy behind the exhaustion rule and the inseparable procedural default rule, see *infra*, at 25, reinforces the implication that "more particular analysis" is required to preserve a claim.[4] Since 1886, federal law has required state prisoners to make their claims in state court before turning to the federal courts. See *Ex parte Royall*, 117 U. S. 241, 251-252 (1886); 28 U. S. C. § 2254(b). This requires giving the state courts a fair opportunity to correct the alleged error by fairly presenting the claim. *Baldwin*, 541 U. S., at 29. Raising the claim for the first time on a petition for discretionary review is not enough. See *Castille* v. *Peoples*, 489 U. S. 346, 349, 351 (1989). Nor is raising the claim in a lower state court but dropping it as the case moves up the chain of review. See *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 848 (1999); *Baldwin*, *supra*, at 29-30, 32.

Based on these principles and precedents, merely stating facts underlying a claim combined with a general citation of constitutional rights does not constitute a fair presentation of a federal claim to the state courts. As discussed in Part I, as a practical matter courts depend on lawyers to identify the issues. Lawyers ought not dump this function on the courts, and they should not be rewarded for doing so with a rule that preserves the claims they fail to identify with "fair precision." To the extent that the oft-repeated phrase that a petitioner need not cite "book and verse," see,

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4. The question of whether *pro se* petitioners should be given more slack, see *Pollard* v. *United States*, 352 U. S. 354, 359 (1957), is not presented by this case. All of the pleadings in question were drafted by attorneys.

e.g., *Picard* v. *Connor*, 404 U. S. 270, 278 (1971), is contrary to this principle, it should be disapproved. Among petitioner's pleadings in state court, the very first reference to *Brady* v. *Maryland*, 373 U. S. 83 (1963), appears in his petition for discretionary review in the Tennessee Supreme Court. See *supra*, at 4. *Brady* was not cited to the state trial court in the amendment making the claim based on the late-discovered evidence, see J. A. 19-21, nor is it mentioned in the amendment and memorandum petitioner filed a month later. See Amendment to Petition for Post Conviction Relief and Memorandum Concerning Personal Nature of Waiver Under Tenn. Code Ann. § 40-30-112(b), R. 4, Add. 4, Doc. 1, pp. 164-171.

Petitioner gave the state trial court even less of a "fair opportunity" to decide his *Brady* claim than the efforts found insufficient in *Castille* v. *Peoples*, *O'Sullivan* v. *Boerckel*, and *Baldwin* v. *Reese*. He failed to present the "more particular analysis," the same as the petitioner in *Anderson* v. *Harless*. While the Sixth Circuit's basis for holding that the claim was defaulted was incorrect, the holding itself was correct. As a claim never *fairly* presented to the state courts and not available there now, the claim is defaulted. See *Teague*, 489 U. S., at 297-299.

III. The controlling state court opinion in this case properly held that the claim was defaulted.

A. The Default Holding.

In his second question presented, petitioner asks, "Is a federal habeas court powerless to recognize that a state court erred in holding that state law precludes reviewing a claim?" A "necessary predicate" to this question, see Part II-A, *supra*, is whether the state

court erred. The state court that matters did not err. Petitioner attempts to preclude this question, Brief for Petitioner 22, n. 4, probably because he realizes it is a fatal flaw in his case, but it is fairly included under *Caspari* v. *Bohlen*, 510 U. S. 383, 389-390 (1994), and *Ohio* v. *Robinette*, 519 U. S. 33, 38 (1996). See Part II-A, *supra*, at 11-13.

The state trial court in this case found that claim 41 of the second post-conviction petition was barred as "heretofore determined." J. A. 22. That decision, however, is not the controlling one for the purpose of procedural default analysis in federal habeas corpus. The decision that matters is the "last reasoned opinion." *Ylst* v. *Nunnemaker*, 501 U. S. 797, 803 (1991). In the present case, that is the decision of the Tennessee Court of Criminal Appeals in *Cone* v. *State*, 927 S. W. 2d 579 (1995). The Tennessee Supreme Court's denial of discretionary review without comment, see Brief for Petitioner 7-8, is presumed to be on the same basis as that opinion. See *Nunnemaker*, *supra*, at 803.

At the time of the state collateral proceedings in this case, the pertinent Tennessee statute provided, "Grounds for relief which have been previously determined or waived are not cognizable in a post-conviction action." See *Cone*, 927 S. W. 2d, at 580. Showing the influence of *Fay* v. *Noia*, 372 U. S. 391 (1963), and *Sanders* v. *United States*, 373 U. S. 1 (1963), the statute defined "waived" in terms of "knowingly and understandingly failed to present" the claim, see *Cone*, *supra*, at 581, but then went on to create a rebuttable presumption of waiver from simple failure to raise the claim in the prior proceeding. See also *House* v. *State*, 911 S. W. 2d 705, 708-711 (Tenn. 1995) (tracing history of Post-Conviction Procedure Act and influence of federal case law on it).

Petitioner claims, citing pages 580-581 of the opinion, that the Court of Criminal Appeals ruled "that petitioner's *Brady* claim was 'previously determined either on direct appeal or in appellant's first petition.' " Brief for Petitioner 7. That is not correct. The passage cited summarizes appellant's contentions, the applicable law, part of the case history, and the trial court decision. It does not state a holding by the Court of Criminal Appeals. The passage does not single out the *Brady* claim and specify the ground for denying it. The paragraph containing the phrase quoted by petitioner reads in full:

> "The trial court found that most of the appellant's stated grounds for relief, in addition to being repetitious and cumulative, were previously determined either on direct appeal or in the appellant's first petition. The trial court also noted that many of the appellant's 'grounds' are merely conclusory allegations which fail to state a constitutional deprivation and are therefore not cognizable in a post-conviction action.[2] Finally, the trial court found that the appellant had failed to rebut the presumption of waiver which would preclude the consideration of any new grounds raised in the appellant's petition.

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2. Post-conviction relief will only be granted where a defendant's conviction or sentence is either void or voidable due to the abridgement of a constitutional right. T.C.A. § 40-30-105 (1990)." *Cone*, 927 S. W. 2d, at 581.

In the Joint Appendix are excerpts of pleadings in the *trial court* where petitioner makes a claim of withholding of exculpatory evidence (albeit without citing *Brady*) and makes a showing of why he did not raise that claim earlier. See J. A. 13-14, 17-18, 20-21.

Conspicuously absent from the Joint Appendix is the excerpt of petitioner's brief in the Court of Criminal Appeals where he identifies the *Brady* claim and pinpoints for that court the evidence in the record showing that the factual basis of the claim was unavailable to both petitioner and his counsel until the second postconviction petition.

The reason the *Brady* passage of this brief is not in the Joint Appendix is that there is no such passage. The claim that petitioner *now* contends is so compelling that it undermines confidence in the verdict, see Brief for Petitioner 39, was *never mentioned* in the principal brief to the court that issued the dispositive decision in this case. See R. 4, Add. 4, Doc. 2 (cited below as "CCA Brief"). In the reply brief, there is only a passing mention of the claim. See Court of Criminal Appeals Reply Brief 5, R. 4, Add. 4, Doc. 4. In neither brief was the factual cause for not raising that claim on prior reviews ever specifically pointed out to the appellate court. In this Court, Cone pinpoints paragraph 41 of his affidavit, see J. A. 17-18, but in the Court of Criminal Appeals the only mentions of this document are blanket references to the entire 41-page affidavit with the conclusory assertion that it refutes the presumption of waiver. See CCA Brief 6-8, 13-14, 16, 18.

In *Baldwin* v. *Reese*, 541 U. S. 27, 31 (2004), this Court noted that appellate courts often decide cases from reading the briefs alone and do not read the lower court opinion in every case. Because of the burden that would be imposed on state courts, *Baldwin* held that the petitioner must bring the attention of the appellate court to the federal claim in the appellate brief. See *id*., at 32. The appearance of that claim in the lower court opinion is not sufficient to meet the fair presentation requirement.

To find the factual assertion that petitioner claims established cause for not bringing the claim earlier (or, in Tennessee parlance, rebutted the presumption of waiver), the Court of Criminal Appeals would not only have had to go beyond the brief into the trial court's opinion, it would have had to go beyond that opinion and comb the trial court pleadings itself. This would be a greater burden on the court than the one that *Baldwin* found would be excessive. Cf. *id*., at 31-32. As in *Baldwin*, the burden on postconviction counsel to fairly present the claim would have been minor.

What postconviction counsel did instead was emphasize two main points. First, they claimed that the new deficiencies they had found in trial counsel's performance created a new claim, different from the ineffective assistance claim previously determined. See CCA Brief 14-15. Coincidentally that issue is now before this Court in *Bell* v. *Kelly*, No. 07-1223. Second, on the issue of waiver they maintained strenuously that waiver had to be personal to the petitioner and that the affidavit "conclusively established that he, *personally*, did not waive the claims advanced in his successive petition, as amended." CCA Brief 13 (emphasis in original). For the claims supposedly not waived, they briefed only one. That was a claim regarding the jury instructions under *Sandstrom* v. *Montana*, 442 U. S. 510 (1979). See CCA Brief 16. *Sandstrom* was decided before the crime in this case, so both the legal and factual bases for a challenge to the instruction were available to trial counsel, appellate counsel, and first postconviction counsel. See *Cone* v. *Bell*, 243 F. 3d 961, 973-975 (CA6 2001) (rejecting this claim as defaulted).

Whether "waiver" under Tennessee postconviction law was personal to the defendant and judged on a subjective standard or rather judged on an objective standard so as to include claims defaulted by counsel

without petitioner's personal involvement was unsettled at the time this case was briefed. The question was then pending before the Tennessee Supreme Court in the *House* case. See CCA Brief 13, n. 2; see also *House* v. *Bell*, 547 U. S. 518, 534 (2006). In its decision in the present case, the Court of Criminal Appeals implicitly adopted the objective approach, citing this Court's decision in *McCleskey* v. *Zant*, 499 U. S. 467, 492 (1991), and the Tennessee Supreme Court's decision in *Arthur* v. *State*, 483 S. W. 2d 95, 97 (1972). See *Cone* v. *State*, 927 S. W. 2d 579, 582 (Tenn. Crim. App. 1995). Petitioner's argument that he had not *personally* waived the new claims was therefore insufficient. Six months later, the Tennessee Supreme Court expressly adopted the objective standard, citing the same authorities. See *House* v. *State*, 911 S. W. 2d 705, 714 (1995). Six months after *House*, the Tennessee Supreme Court denied review of the Court of Criminal Appeals' decision in Cone's case. See Brief for Petitioner 8.

The holding of the Court of Criminal Appeals is on page 582, not pages 580-581 as petitioner claims: "We conclude that the appellant failed to rebut the presumption of waiver as to all claims raised in his second petition for post-conviction relief which had not been previously determined." The court correctly rejected the only attack on the presumption of waiver that petitioner made in his principal appellate brief. The fact that the court did not *sua sponte* locate in the record and decide another attack petitioner might have made is irrelevant under *Baldwin*.

The Court of Criminal Appeals also did not correct the trial court's error in assigning claim 41 to the "previously determined" category rather than the "waived" category. There are two good reasons why it did not. First, petitioner never specifically mentioned claim 41 in his appellate brief, nor did he explain why

the trial court was mistaken on that particular point. His only mention of claim 41 in the reply brief makes only a conclusory statement that the claim had not been waived and does not mention that it was mistakenly designated as previously determined. Second, appellate courts are in the business of reviewing judgments, not opinions. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842 (1984). Given the holding of the Court of Criminal Appeals that the petitioner had failed to rebut the presumption of waiver as to all new claims, the assignment of a claim to one category or the other made no difference in the judgment.

To the extent that petitioner may be considered to have presented a *Brady* claim at all, but see Part II, *supra*, petitioner is correct that this claim had not been presented to the state courts in a prior proceeding. See Brief for Petitioner 29; Brief for Respondent 31-32. The opinion of the Court of Criminal Appeals is best interpreted as holding that this claim, along with all other new claims, was defaulted. Indeed, postconviction counsel themselves appear to have interpreted it that way, briefing the *Brady* claim to the Tennessee Supreme Court as a "waiver" issue. See *supra*, at 4. The Court of Criminal Appeals made a blanket holding for all the new claims for the simple reason that petitioner made a blanket argument for all these claims. The Court of Criminal Appeals correctly decided the argument presented to it, and that decision is an adequate and independent state ground for the judgment.

B. Adequacy.

Petitioner's second question presented is, "Is a federal court powerless to recognize that a state court erred in holding that state law precludes reviewing a claim?" Generally, the state court holding on a ques-

tion of state law is binding on the federal court. See *Bradshaw* v. *Richey*, 546 U. S. 74, 76 (2005) (*per curiam*). This is true of procedural rulings as well as substantive ones. See *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120, 129 (1945). The federal court is indeed "powerless" to substitute its own opinion of state law for that of the state court, but review of the claim on the merits is not always precluded.

The most common way around a state procedural default is the "cause and prejudice" exception of *Wainwright* v. *Sykes*, 433 U. S. 72, 90-91 (1977), and its progeny. Indeed, in the many states where the state's procedural default rule parallels *Sykes*, see *Sanchez-Llamas* v. *Oregon*, 548 U. S. 331, 351 (2006), there is no need to declare that the state court erred because the federal court can evaluate directly, as a matter of federal law, the same cause that petitioner says should have been considered by the state court.

The second route around procedural default is inadequacy of the state ground. Petitioner invokes this line of cases, see Brief for Petitioner 30-36, but to the extent he implies that the line authorizes a simple second-guessing of the determination of state law, see *id*., at 34, he is mistaken. The "adequate state grounds" line is confused and in dire need of clarification, see Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Philip Morris USA* v. *Williams*, No. 07-1216, pp. 8-13, but not even its most extreme stretches go that far.

Procedural default law evolves in the state courts just as it has in this Court. See, *e.g.*, *Sykes*, 433 U. S., at 87-88 (cause and prejudice test supplanting former test for default); *McCleskey* v. *Zant*, 499 U. S. 467, 495 (1991) (same for abuse of the writ). In the course of this evolution, a petitioner may find that a default that previously would have been excused no longer will be,

just as Sykes and McCleskey did. A decision that differs from state precedent does not warrant a federal court declaring the state rule inadequate. What will result in such a holding is a "bait and switch," such that a litigant following a procedure previously considered correct, not merely excusable, finds himself without a remedy. Compare *Reich* v. *Collins*, 513 U. S. 106, 111 (1994) ("bait and switch"), with *Walker* v. *Birmingham*, 388 U. S. 307, 320 (1967) ("on notice" of correct procedure). *Johnson* v. *Mississippi*, 486 U. S. 578, 587-588 (1988), on which petitioner relies, is a bait-and-switch case where the procedure the petitioner used had been expressly declared to be the correct one. No bait and switch occurred here. All Tennessee defendants had notice that claims needed to be made on direct appeal if possible and otherwise on the first petition, and the only uncertainty was the circumstances under which failure to do so would be excused.

Petitioner also invokes *Lee* v. *Kemna*, 534 U. S. 362 (2002), one of a "limited category" of "exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question." *Id*., at 376. Regardless of whether *Lee*'s "exorbitant application" rule, see *ibid*., would render the trial court decision an "inadequate" bar, there is nothing exorbitant about the decision that matters, that of the Court of Criminal Appeals.

Petitioner contends that his *Brady* claim was not procedurally defaulted under state law because the factual basis for the claim was not available until the second postconviction petition, which is essentially the same as the argument for cause for default under the federal *Sykes* test. See Brief for Petitioner 7, n. 1, 36-37, n. 7. Assuming *arguendo* that rejection of this argument by the Court of Criminal Appeals would have

been an "exorbitant application" of the state rule, petitioner still cannot prevail because he did not make that argument to that court.

In *Edwards* v. *Carpenter*, 529 U. S. 446, 452 (2000), the Court noted that the procedural default doctrine is inseparable from the exhaustion rule. It is "necessary to protect the integrity of the federal exhaustion rule." *Id*., at 453 (internal quotation marks omitted). The purposes of that rule "would be . . . frustrated were we to allow federal review to a prisoner who had *presented* his claim to the state court, but in such a manner that the state court could not, consistently with its own procedural rules, have entertained it." *Ibid*. (emphasis in original). Edwards had presented a sufficiency-of-evidence claim for the first time in an untimely petition that followed both direct appeal and postconviction review, and he asserted ineffective assistance as cause for not bringing that claim earlier. See *id*., at 448-449. The Court held that unless the default of the ineffective assistance claim was itself excused, that claim could not form the basis of an excuse for the main claim. The petitioner had not given the state courts a "*fair* opportunity to pass upon his claims," *id*., at 453 (emphasis in original, internal quotation marks and brackets omitted), when he presented his cause for default late, unless he also had cause for *that* late presentation.

In the present case, Cone did not present his cause for late presentation of claim 41 to the Court of Criminal Appeals at all. See Part III-A, *supra*; Brief for Respondent 33-35. The principles underlying *Edwards* and *Baldwin* apply equally to this case. If a petitioner can claim that the state court's application of its generally sound rule is inadequate because he had cause for default which he never pointed out to the appellate court, the purpose of the rule requiring fair presentation would be defeated. As in *Baldwin*, the fact that the

appellate court could have found this cause in the record itself is not sufficient. See *supra*, at 19-20. The rule of *Lee* v. *Kemna* provides no basis for dodging the decision of a state appellate court that correctly decided the arguments presented to it.

IV. A subclaim or the factual basis for a claim can be procedurally defaulted when the claim is rejected in a successive state petition as "previously determined."

Although *amicus* CJLF believes it is not necessary to the resolution of the case, a few words of clarification are in order regarding the relationship between the rejection of a claim as previously determined and the status of the claim under the procedural default rule. Petitioner is correct that repeated presentation of a claim already fairly presented once cannot render that claim defaulted. See Brief for Petitioner 25. However, "claims" do not always come with crisply defined edges. They tend to grow as the case moves through the system, and that growth makes the problem more complex.

The pre-AEDPA federal habeas law distinguished between a second habeas petition presenting a new "ground" and one that did not. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Bell* v. *Kelly*, No. 07-1223, pp. 14-19. Ineffective assistance was a single "ground" then, see *id*., at 16, and it is a single "claim" under the current statute. See *id*., at 17-19. In the present case, the state trial court understood "ground" in Tennessee law the same way, so it rejected the ineffective assistance allegations as "previously determined" even though many of the subclaims were new. Memorandum, Criminal Court, 30th Dist., 2-4 (Dec. 16, 1993), R. 4, Add. 4, Doc. 1, pp. 219-221.

The federal procedural default rule operates at a finer level. The factual basis of a claim can be defaulted when the legal argument was timely presented. See *Keeney* v. *Tamayo-Reyes*, 504 U. S. 1, 7-8 (1992). Also, as the District Court recognized in the present case, ineffective assistance subclaims presented for the first time in the second state postconviction petition are defaulted when the state court rejects the whole ineffective assistance claim as "previously determined." See App. to Pet. for Cert. 106a-109a. See *Bradshaw* v. *Richey*, 546 U. S. 74, 79-80 (2005) (*per curiam*) (default of "subclaims" of ineffective assistance).

There is no need to brief this point in detail because it is not actually presented by the facts of this case on the question presented in this Court. *Amicus* mentions it only to caution against possible dicta suggesting that a claim rejected as previously determined on a successive state petition is necessarily open in its entirety for review on the merits in federal court. That conclusion does not follow.

V. Regardless of procedural default, the Court of Appeals' rejection of Cone's claim on the merits is sufficient to affirm the judgment or to dismiss the writ of certiorari as improvidently granted.

Petitioner maintains, "No court has ever fully considered, let alone ruled upon, the merits of petitioner's *Brady* claim." Brief for Petitioner 37. That is not correct. The Court of Appeals has considered this case three times now, and on the third time it held "the documents discussed in the dissenting opinion that were allegedly withheld are not *Brady* material. We said this before in *Cone*, 243 F. 3d, at 968-70, and we now say it again." *Cone* v. *Bell*, 492 F. 3d 743, 756

(CA6 2007). This is holding, not dictum. Petitioner's "question presented" does not challenge this holding.

In its first decision of this case, the Court of Appeals held without dissent that the *Brady* claim was procedurally defaulted. See *supra*, at 5. Cone's attempt to reopen a closed question on remand from this Court therefore raised the "law of the case" doctrine. The Sixth Circuit follows the standard rule: "The law of the case doctrine . . . precludes reconsideration of a previously decided issue unless one of three 'exceptional circumstances' exists: (1) where substantially different evidence is raised on subsequent trial; (2) where a subsequent contrary view of the law is decided by the controlling authority; or (3) where a decision is clearly erroneous and would work a manifest injustice." *Westside Mothers* v. *Olszewski*, 454 F. 3d 532, 538 (CA6 2006); see 18B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4478, p. 670 (2d ed. 2002). There has been no subsequent trial, so clause (1) does not apply. The court considered and rejected the argument that *Banks* v. *Dretke*, 540 U. S. 668 (2004), was a major change in the law for the purpose of clause (2). See *Cone*, 492 F. 3d, at 754. Indeed, it could not be, as *Banks* was decided on habeas corpus and subject to the *Teague* rule. See *Breard* v. *Greene*, 523 U. S. 371, 377 (1998) (*per curiam*) (novel theories are necessarily *Teague*-barred). The question of whether any exception to the law-of-the-case rule applies thus comes down to clause (3).

The dissent says, "The law of the case doctrine . . . does not wed us forever to a clear misreading of the record," 492 F. 3d, at 765, evidently a reference to the "clearly erroneous" prong of clause (3). The majority says the dissent's argument is interesting but need not be considered because the evidence is not *Brady* material, *id*., at 756, which can only be a reference to the

conjunctive requirement of clause (3) that there be a miscarriage of justice. This is a holding, not dictum, that petitioner has not qualified for an exception to the law of the case doctrine because even if the court reversed itself on procedural default and reached the merits, the claim has no merit.

The law of the case doctrine by itself does not shield a lower court's decision from review in this Court. See *Christianson* v. *Colt Industries Operating Corp*., 486 U. S. 800, 817-818 (1988). However, in this case the lower court's holding on law of the case constitutes a holding on the merits of the underlying claim. That holding is simply the application of settled law to particular facts. Although petitioner devotes almost half of his brief arguing the point, it is not one this Court should decide. First, the application of settled law is not normally the kind of question that calls for the invocation of this Court's discretionary review. See Supreme Court Rule 10, last sentence. Second, decision of the merits of the *Brady* claim is not fairly included in the question petitioner asked this Court to decide in his certiorari petition, *i.e.*, whether the Court of Appeals was required to reach the merits. The merits question is not a predicate to the procedural default question, cf. *Caspari* v. *Bohlen*, 510 U. S. 383, 390 (1994), but just the opposite. The merits are not normally reached unless and until the procedural default question has been decided in the petitioner's favor. See *Lambrix* v. *Singletary*, 520 U. S. 518, 524 (1997).

No compelling claim of a miscarriage of justice calls for this Court to set aside its normal approach to the questions to be decided. There is no question in this case that Gary Cone is, in fact, the person who so brutally butchered the elderly Shipley and Cleopatra Todd, simply to ransack their home in order to make his escape. See *State* v. *Cone*, 665 S. W. 2d 87, 89-90

(Tenn. 1984). The discussion of post-traumatic stress disorder (PTSD) by *amicus* Veterans for America is essentially irrelevant because PTSD evidence was not withheld by the prosecution. The evidence in dispute relates to drug use. That evidence is very weak. The defendant engaged in clearly goal-directed activity to obtain money for the purpose of making his cross-country escape for the purpose of evading the police who were attempting to arrest him. These are not the actions of a person so out of touch with reality as to be incapable of the very rudimentary mental state needed for criminal culpability. See *id*., at 90-91; App. to Pet. for Cert. 118a-119a, n. 9 (District Court opinion). Evidence that the defendant used drugs habitually or was on drugs on the day before the crime has minimal weight in comparison to facts of the crime and defendant's own statement to his own expert.

If this Court were to decide the question presented in petitioner's favor but not decide the question he tries to smuggle in, what relief could it order? Petitioner's demand for an evidentiary hearing, see Brief for Petitioner 51, is unsupported by precedent. If evidence not specifically requested is not materially exculpatory on its face, it is not *Brady* material. See *United States* v. *Agurs*, 427 U. S. 97, 107 (1976).

Should the Court issue its standard order for proceedings not inconsistent with the Court's opinion? The Court of Appeals could comply simply by restating for a third time its twice-stated conclusion that the evidence in question is not *Brady* material. The only thing accomplished by such a remand would be delay. But this case has been delayed far too long already. This is a well-deserved sentence for a brutal, selfish crime against a helpless, elderly couple who were simply minding their own business in their own home. Its execution is long overdue.

CONCLUSION

The judgment of the Court of Appeals for the Sixth Circuit should be affirmed, or the writ of certiorari should be dismissed as improvidently granted.

November, 2008

Respectfully submitted,

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